DATE: August 23, 2006

In Re:

SSN: -----------

Applicant for Security Clearance

CR Case No. 04-10574

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of petit larceny and criminal mischief offenses during his teens and early 20s. He was also fined for petit larceny in 2002 after he took a trailer from a gated property. He deliberately did not disclose the 2002 offense on his security clearance application. Criminal conduct and personal conduct concerns are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On June 24, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons under Guideline J, criminal conduct, and Guideline E, personal conduct, why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.(1)

On July 26, 2005, Applicant, acting *pro se*, answered the SOR. By letter from DOHA dated August 12, 2005, Applicant was directed to admit or deny to SOR ¶ 2.a. and to indicate whether he wanted a hearing or a determination on the written record. In a subsequent response which is not of record, Applicant apparently requested a hearing before a DOHA administrative judge. The case was assigned to me on January 3, 2006. Pursuant to notice dated January 13, 2006,(2) I convened a hearing on March 1, 2006. Five government exhibits were admitted and testimony was taken from the Applicant, as reflected in a transcript received March 15, 2006.

The record was held open for two weeks after the hearing for the government to obtain a complete copy of government exhibit 4. No document was submitted by the March 15, 2006, due date.

FINDINGS OF FACT

DOHA alleged under Guideline J that Applicant was convicted of a June 1991 criminal mischief offense, of October 1992 unlawful trespass and petit larceny offenses, and of a July 2002 petit larceny offense, and was also arrested for

driving without consent of owner in February 1994 and 2nd degree burglary and 2nd degree criminal mischief in December 1995. Under Guideline E Applicant was alleged to have deliberately falsified his June 2003 security clearance application (SF 86) for failing to disclose his July 2002 arrest. Applicant admitted his criminal arrests, although he indicated he could not recall the June 1991 criminal mischief, and denied any culpability with respect to the February 1994 and December 1995 offenses. Applicant denied he intentionally falsified his SF 86. Applicant's admissions are incorporated as findings of fact. After a complete review of the evidence, I make the following additional findings:

Applicant is a 31-year-old electrician who has been employed by a defense contractor since August 2003. Hired on as a painter, he was transferred to the electrical shop after about eight months. He seeks a secret-level security clearance for his duties.

Applicant associated with the "wrong crowd" as a youth, and consequently had little regard for the law. When he was only 16, while visiting in the state where he now resides, Applicant was arrested for criminal mischief. Available information indicates he was sentenced to six months, although it is not clear if he ever served any time in juvenile detention.

In about November 1992, Applicant and a friend broke into a trailer full of liquor. Arrested and charged with aid in commission of a felony (burglary) and unlawful trespass, he was sentenced in February 1993 to a jail term of four to 12 months (suspended), 40 hours of community service, a $200 fine, and probation. He was discharged from probation in mid-June 1993.

In February 1994, Applicant spent a few days in jail after he was arrested for driving a vehicle without the consent of the owner. Applicant maintains he had permission to operate the vehicle and the government presented no evidence to the contrary. The charge was dropped.

In December 1995, Applicant was charged with burglary 2nd degree and criminal mischief 2nd degree after he was suspected in the damaging of an apartment. Applicant denies inflicting any damage to the premises. Available criminal record information does not reflect a guilty finding, although Applicant indicates he spent two weeks in jail and was placed on two years probation for being an accessory.

In May 1995, Applicant and his current fiancee had a son. They subsequently broke up, and Applicant married another woman in August 1997 by whom he had had a son in July 1997. Applicant supported his family by working as an assembler for a local canoe manufacturer until May 1999 when the business relocated. Applicant found another job as an assembler for a train manufacturer. Laid off in July 2001, he began working as a drafter but had difficulties performing his job due to dyslexia. After only about a month, he was laid off, as he and his employer had agreed it would be best if he not continue in the job.

Unemployed since September 2001, Applicant financed the purchase of an all-terrain recreational vehicle (ATV) in about July 2002. A few days later, he found a trailer in the woods while out four-wheeling. The trailer was on an unposted lot, although the property was gated with the gate open. Applicant hooked the trailer up to his ATV and took it home. Applicant was charged with petit larceny of $500 or less. In court he pleaded guilty as he wanted to put the incident behind him, and he was fined about $125. Applicant understood from the judge that by pleading guilty, the offense would be on his record, although he maintains that he thought the trailer was abandoned.

Applicant and his spouse experienced marital difficulties during his lengthy unemployment, and he renewed his relationship with the mother of his first child. Legally separated from his spouse as of November 2002, Applicant moved to his present locale in December 2002. Since at least March 2003, he has made his home with his fiancee and their son. As of March 2006, Applicant's six-year-old son was living with his ex-wife.

In January 2003, Applicant began working as a fiberglass technician for a local company. Seeking better working conditions, he applied for a job with his present employer on February 11, 2003. Applicant responded affirmatively on his employment application as to any criminal convictions since his 16th birthday, and indicated that he had been convicted of a trespassing offense in August 2002, for which he was fined $150. In April 2003, Applicant quit his job as

a fiberglass technician as he considered the work environment unsafe. Applicant subsequently reviewed his application for employment with the defense contractor. At that time, he added on his employment application that he had also been convicted in May 2003 for speeding and in June 1991 for criminal mischief, and that he had no criminal convictions since.

On June 6, 2003, Applicant executed a security clearance application (SF 86) prepared for his signature from a handwritten security clearance application he had turned in to his employer a week earlier. He responded negatively to the criminal record inquiries, including whether he had been arrested for, charged with, or convicted of, any offense within the last seven years. Applicant was hired as a painter and started working for the defense contractor in August 2003.

On June 28, 2004, Applicant was interviewed by a Defense Security Service (DSS) special agent about his arrest in 2002. Applicant averred he had been charged with larceny and trespassing after he had attempted to take home what he thought was an abandoned trailer; that he had pled guilty to the larceny offense and fined approximately $125. Applicant indicated that he had "inadvertently" omitted the offense from his SF 86 but had not attempted to conceal the offense, as he had listed it on his application for employment with the defense contractor, albeit as a trespassing charge as he had been "confused."

At his hearing, Applicant provided inconsistent explanations for his failure to disclose his 2002 offense on his SF 86. He testified initially on direct, "Again, I had thought I mentioned it on the application. I don't understand why I didn't." (Tr. 36) He later indicated, "I honestly didn't think it was going to make it into my police record." (Tr. 41) When asked about the omission on cross examination, Applicant responded:

As I stated, because I misunderstood the question, in the last seven years been arrested for, or charged with, convicted of any offense not listed in modules 20 through 25, traffic fines. Yes, I probably-I don't have an answer for that sir, like I said, I wasn't trying to hide anything. (Tr. 56)

When asked specifically why he had indicated on his SF 86 that the charge had been for trespassing when it was for larceny, Applicant testified that the judge fined him for trespassing, that the charge had been reduced to trespassing. (Tr. 58) While he eventually admitted he had been convicted of larceny for removing the trailer from the property without the owner's permission (Tr. 60), he claimed to not understand that the fine was for larceny and maintained that the judge had told him in court that he wasn't being charged with larceny because the value was less than $500. (Tr. 61) While continuing to deny any intentional falsification of his SF 86, Applicant later added, "All I know is that I am trying to save my job." (Tr. 82)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Concerning the evidence as a whole, the following adjudicative guidelines are most pertinent to this case:

Personal Conduct. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. (¶ E2.A5.1.1.)

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (¶ E2.A10.1.1.)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to Guidelines J and E:

Criminal conduct raises security concerns because of the doubts it creates for a person's judgment, reliability and trustworthiness. Someone who has violated state or federal law may disregard security regulations that they disagree with or find personally inconvenient. Applicant's involvement in criminal mischief in 1991, unlawful trespass and petit larceny in 1992, second degree criminal mischief and aid in commission of the felony offense of burglary in 1995, and petit larceny in 2002 fall within Guideline J disqualifying conditions (DC) ¶E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*, and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*. Applicant indicates he was placed on probation for being an "accessory" to the crime, although he did not commit the burglary himself. The government failed to prove culpability with respect to the alleged driving without consent of owner in February 1994, however.

Applicant's criminal conduct from 1991 to 1995 is not recent (*see* ¶ E2.A10.1.3.1. *The criminal behavior was not recent*) and is reasonably attributed to his immaturity (*see* ¶E2.2.1.4.) and peer influence. However, the DOHA Appeal Board has consistently held that an applicant's conduct and circumstances are not be evaluated in a piecemeal fashion. *See, e.g.*, ISCR Case No. 00-0628 (Feb. 24, 2003, citing ISCR Case No. 99-0601 Jan. 30, 2001, at p. 8 ("'Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner.'"). Under ¶ E2.2.4. of the Directive, even if adverse information pertaining to any given guideline is not sufficient to warrant an adverse security clearance decision, an applicant may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. He pleaded guilty to a 2002 petit theft of a trailer from a gated property--a crime of intent.

Furthermore, he failed to disclose that offense on his SF 86, thereby raising serious concerns about his judgment under Guideline E. DC ¶ E2.A5.1.2.2. *The deliberate omission, concealment, or falsification of relevant and material fact from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) applies. Although not alleged under Guideline J, it is noted that Applicant violated 18 U.S.C. § 1001 by deliberately omitting that offense from his June 2003 security clearance application.[(3)]

In his favor, Applicant did not deny his arrest and conviction when he was interviewed by the DSS agent in June 2004. Yet, it is not clear that he provided the information voluntarily before being confronted, which is required by Guideline E ¶ E2.A5.1.3.3. *The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts*. Furthermore, reform of the criminal conduct and personal conduct concerns is not proven where Applicant does not acknowledge his responsibility for misconduct, including the SF 86 omission. He claims to have no recall of the June 1991 criminal mischief, but remembered enough to list the offense and a six-month sentence when he completed his application for employment with the defense contractor. As for the December 1995 charges, Applicant explained in his answer to the SOR that he had been charged with damage that he did not commit, but he also admitted he had spent two weeks in jail (apparently for failing to appear, Tr. 99) and two years probation for the crime. His inconsistent explanations for his failure to report the July 2002 larceny on his SF 86 (he thought he mentioned it; he misunderstood the question; he inadvertently neglected to list it; he didn't think it was going to be on his record) undermine his claim of innocent mistake. Disclosure of his 2002 arrest on his application for employment is not

demonstrative of good faith where he misrepresented the nature of the charge (trespassing rather than larceny) on his employment application.

While Applicant's association with persons involved in criminal activities has ceased and therefore ¶ E2.A5.1.3.7. of Guideline J applies, doubts persist as to whether he possesses the requisite good judgment, reliability, and trustworthiness for access to classified information. He has little appreciation for his obligation of full candor to the government or of the security concerns engendered by failure to comply with the law:

So, I mean, honestly, I don't understand how a police record would not allow me to get clearance to work at [the defense contractor]. I mean, it's not--my police record doesn't have anything that, you know, I gave secrets to somebody, or I was arrested for espionage, or treason to my Government. My police record, I mean, 25 people, ten of them or 15 percent of them are going to have a police record. Yes, I did things when I was wrong, when I was younger, and progressively it happened therefore after, but honestly I don't really see how this is going to stop me from getting a clearance. To be honest I don't really see how this is going to stop me from getting a clearance.

(Tr. 64) In light of the totality of the evidence, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant access. SOR ¶¶ 1.a., 1.b., 1.d., 1.e., and 2.a are resolved against him. SOR ¶ 1.c. is found for him as there is insufficient evidence of culpability on his part.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1.

2. Notice of the hearing was also sent to legal counsel, Department Counsel having informed me that Applicant had retained an attorney to represent him. Applicant subsequently elected to represent himself at his hearing.

3. 18 U.S.C. § 1001 provides in part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive,

legislative, or judicial branch of the Government of the United States, knowingly and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

In this case, MC ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*, is inapplicable in part because of his violation of 18 U.S.C. § 1001.